IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al., PLAINTIFF

v. CASE NO.: 05-CV-329-TCK-SAJ

TYSON FOODS, INC., et al., DEFENDANTS

DEFENDANT COBB-VANTRESS, INC.'S REPLY IN SUPPORT OF FIRST MOTION TO COMPEL DISCOVERY AND REQUEST FOR EXPEDITED HEARING AND *IN CAMERA* REVIEW

TABLE OF CONTENTS

FEDERAL CASES

FEDERAL RULES

LOCAL RULES

Defendant Cobb-Vantress, Inc. ("Cobb-Vantress") submits the following as its Reply in Support of its First Motion to Compel Discovery (Dkt. No. 743). Cobb-Vantress further requests pursuant to Local Rule 37.2(b) an Expedited Hearing and an *in camera* review of documents by the Court.

I. INTRODUCTION

This Court's decision on the pending motion to compel will have far-reaching consequences with respect to either the delay or advancement of this case. Cobb-Vantress seeks only to discover ***facts*** regarding the nature, extent and results of environmental sampling which: (1) are decidedly relevant to the issues in this case and (2) have been touted by Plaintiff in numerous pleadings and in hearings before this Court as the basis for relief which this Court has granted. In its Response, Plaintiff argues that it is entitled to withhold these facts from Cobb-Vantress, perhaps in perpetuity, but at least until expert reports are due shortly before trial. Plaintiff's position on the issues before the Court is not supported by the law and if accepted by this Court would severely prejudice Cobb-Vantress' ability to defend itself in this case.

II. LEGAL AUTHORITY AND ARGUMENT

Plaintiff's response, while lengthy, fails to disclose a single instance in which a court denied a defendant accused of injuring the environment discovery of sampling data collected by the plaintiff. Instead, Plaintiff's response offers only a steady diet of easily distinguished cases, unverified characterizations of the documents and information withheld and unsupported interpretations of various provisions of Federal Rule 26. In the end, Plaintiff has failed to provide this Court with any legal or factual basis to justify its refusal to provide the information and documents sought in Cobb-Vantress' First Set of Interrogatories and Requests for Production of Documents ("First Set of Discovery").

A. The Court Should Conduct an *In Camera* Review.

Courts routinely conduct *in camera* reviews of documents and information to evaluate claims of privilege which have been challenged by another party. *See, e.g., In re Grand Jury Proceedings*, 658 F.2d 782, 784 (10th Cir. 1981); *In re September 1975 Grand Jury Term*, 532 F.2d 734 (1976); *Falconcrest Aviation, L.L.C. v. Bizjet International Sales and Support, Inc.*, 2005 WL 2789202, at *1 (N.D. Okla., October 12, 2005); *Andrews v. St. Paul Re Insurance Co., Ltd.*, 2000 WL 1760638, at * 2 (N.D. Okla., November 29, 2000) (unpublished opinion). An *in camera* review is necessary in the present case for several reasons.

First, the privilege log submitted by Plaintiff raises serious questions as to the basis for any claim of attorney work-product privilege for several of the categories of documents and information withheld. (Ex. 2 to Motion to Compel; Dkt. No. 743.) For example, item numbers 267-275 on the privilege log describe internal communications among personnel at the Oklahoma Water Resources Board ("OWRB"). Item numbers 278 and 279 on the privilege log are simply described as correspondence to "various state agencies." The basis for a claim of attorney work-product privilege on communications with or within state agencies has not been explained by Plaintiff. Similarly, in item numbers 239 and 249, Plaintiff has claimed attorney work-product protection on documents authored by the United States Geological Survey, a federal agency. In correspondence dated May 22, 2006, Plaintiff was asked for explanations of these and other claims of privilege and more specific descriptions of the documents being withheld. (*See* Ex. 1 attached hereto, R. George, May 22, 2006 Letter to R. Nance.) As of the

filing of this Reply, Plaintiff has not responded to Cobb-Vantress' questions concerning the privilege log.[1]

In addition to the unexplained discrepancies in Plaintiff's privilege log, an *in camera* review is necessary in this case to evaluate claims made by Plaintiff in its Response regarding the documents and information withheld. Plaintiff's Response continues Plaintiff's disturbing practice of expecting the parties to this action and this Court to accept as accurate its characterizations of documents, data or information which it refuses to disclose. For example, Plaintiff claims that the information and documents responsive to the First Set of Discovery "are not, as defendant contends, simple facts" and cannot "be divided into 'fact' and opinion work product." (Pls. Response, p. 3-4; Dkt. No. 799.) Whether the material at issue contains raw factual information which could be divided from any opinion work product is a question that necessarily requires this Court to review the materials withheld by Plaintiff. Consequently, Cobb-Vantress asks that the Court conduct an *in camera* review of all documents responsive to the First Set of Discovery which have been withheld by Plaintiff under a claim of privilege and requests that the order setting a hearing on the Motion to Compel require Plaintiff to bring all such documents and information with it to the hearing.

---

[1] On a related note, Plaintiff suggests in its response that Cobb-Vantress did not make good faith efforts to resolve this discovery dispute before filing the Motion to Compel (Pls. Resp. P. 2, fn. 1; Dkt. No. 799.) In addition to the May 22, 2006 letter, the State's position on the non-discoverability of sampling data was extensively discussed in the Rule 26(f) conference and in numerous hearings in this case. The State's refusal to produce this highly relevant information without a court order is well documented. Plaintiff also claims in its response that it agreed to produce "non-privileged documents" responsive to the First Set of Discovery and that such documents would be identified on "an index of the responsive documents within the document production." (Pls. Resp., p. 2; Dkt. No. 799.) Plaintiff did produce approximately 70,000 pages of documents on June 15, 2006, but no index of documents within that production responsive to the First Set of Discovery has been provided. The undersigned counsel's preliminary review of these documents failed to identify any environmental sampling data responsive to the First Set of Discovery.

B. Any Work-Product Protections Otherwise Available Have Been Waived.

While Plaintiff argues vigorously for a tortured construction of Fed. R. Civ. P. 26(b)(3) and (b)(4) under which the information withheld would be protected, its Response is utterly devoid of any justification sufficient for this Court to apply those protections in light of the very clear waiver that has occurred through Plaintiff's own conduct in these proceedings. Cobb-Vantress submits that the existence of an "at issue" waiver in this case is beyond serious dispute and that this Court would be justified in granting the Motion to Compel on that basis alone.

Plaintiff agrees that the appropriate test for determining at-issue waiver is that announced in *Sinclair Oil Corp. v. Texaco, Inc.*, pursuant to which a waiver has occurred if:

1) the assertion of the privilege is a result of some affirmative act by the asserting party;

2) the asserting party, through the affirmative act, has put the protected information at issue by making it relevant to the case; and

3) application of the privilege would deny the opposing party access to information that was vital to the opposing party's defense.

208 F.R.D. 329, 335 (N.D. Okla. 2002). *See also*, *Cardtoons L.C. v. Major League Baseball Players Ass'n*, 199 F.R.D. 677, 681 (N.D. Okla. 2001). Plaintiff concedes that the first factor of this test is satisfied, but claims the second and third factors are not met in this case. (Pls. Response, p. 20-21; Dkt. No. 799.)

Plaintiff incredibly argues that it has not placed the materials sought by Cobb-Vantress at issue because it merely "mention[ed] the existence of sampling information in Plaintiff's Motion for Leave to Conduct Limited Expedited Discovery." (Pls. Response, p. 21; Dkt. No. 799.) Here, Plaintiff apparently believes it has the power to re-write history. As shown in the following chart, Plaintiff has consistently put the existence of its investigation and the very

nature and results of its environmental sampling at issue through repeated representations to this Court both in pleadings and in hearings:

Statement/Representation	Source/Reference
Plaintiffs' "***investigation*** of the Poultry Integrator Defendants' waste disposal practices ***has revealed*** that certain ***contaminants*** associated with the land disposal of poultry waste ***exist at levels within the environment*** such that they either pose a risk to human health or lead to the creation of chemicals which threaten human health.	Pls. Mot. for Leave to Conduct Limited Expedited Discovery, p. 4; Dkt. 210.
The results of Plaintiff's sampling show "the ***water*** in the IRW ***contains levels of bacteria*** which propose a danger to human health."	Pls. Mot. for Leave to Conduct Limited Expedited Discovery, p. 9; Dkt. 210
The results of Plaintiff's sampling show that "***groundwater, including water in the numerous springs in the IRW, has been contaminated*** so as to be a hazard to persons who drink from such sources."	Pls. Mot. for Leave to Conduct Limited Expedited Discovery, p. 9; Dkt. 210
Plaintiff's investigation found that "the waste disposal practices" of the defendants "have caused algae to form in the once pristine waters of the IRW."	Pls. Mot. for Leave to Conduct Limited Expedited Discovery, p. 10; Dkt. 210
"[F]rom the limited ***sampling*** we have been able to do, **an increased *level* of trihalomethanes**, which are carcinogens, ***has been found*** in the public water supply of Talequah and rural water districts in Cherokee County."	Mr. Edmondson, March 23, 2006 Hrg. Tr., p. 10.
We have found "**high levels of fecal coliform, e. coli and enterococci"** in the tributaries of IRW.	Mr. Edmondson, March 23, 2006 Hrg. Tr., p. 11.
"[T]here is the fact that everybody knows that ***we have done copious testing of the surface waters throughout the Illinois basin***. They have seen our yellow barrels out there ***taking high flow and base flow samples. We have tested that.*** And so, we have plead in this Court that those waters are polluted. Now, what we are seeking is to trace those things **which we found in the river** and tie them back to the waste in the houses and going on the fields."	Mr. Bullock, May 17, 2006 Hrg. Tr., p. 16 (argument in support of State's request to conduct further sampling on privately owned lands).

Contrary to Plaintiff's assertion, its public representations about previously conducted sampling and investigations have been anything but trivial or peripheral. Plaintiff has consistently thrust the extent and nature of sampling events and investigations and the purported results of such activities into a place of prominence in this case. Plaintiff has not just mentioned

these activities in passing but instead has **expressly relied upon** these activities and its claims about the results of such activities as a basis for requesting and receiving relief from this Court.

Clearly, Plaintiff's conduct in the present case is far more direct and significant than those found by other courts to be sufficient to constitute an "at issue" waiver. *See, e.g., Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 732 (8th Cir. 2002)(finding that the party claiming work-product protection had "clearly placed the work of its attorneys squarely at issue" by instituting a lawsuit where information and documents from an earlier case were relevant); *Ins. Corp. of Ireland, Ltd. v. Bd. of Trustees of S. Ill. Univ.*, 937 F.2d 331, 334 (7th Cir. 1991) (finding that a party's claim that it had paid certain legal fees "under duress . . . put into play the issue of its state of mind when it made the . . . payments and waived any defense privilege" regarding documents relating to that issue.) Furthermore, when a party makes representations to the Court it places the truthfulness of those representations at issue. *See Bowne of City of New York, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 488 (S.D.N.Y. 1993) ("[E]ven if a party does not attempt to make use of a privileged communication, he may waive the privilege if he asserts a factual claim the truth of which can only be assessed by examination of a privileged communication.") (citing *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991). Plaintiff has consistently represented that the results of its environmental sampling and investigation demonstrate the presence of elevated levels of certain constituents in the Illinois River Watershed ("IRW") and confirm that such constituents derive from the operations of Cobb-Vantress and the other defendants. Cobb-Vantress is entitled to verify the truth or falsity of these representations. Such verification requires the disclosure of the underlying data upon which Plaintiff's assertions are allegedly founded. If Plaintiff was truthful in its remarks, it has nothing to hide. If those remarks were

untrue or wild exaggerations, Cobb-Vantress, the other parties to this case and the Court have a right to know that.

Plaintiff's claim that the application of the attorney work-product doctrine would not deprive Cobb-Vantress of information vital to its ability to effectively defend this case is also without merit. Plaintiff cites *Frontier Refining, Inc. v. Gorman-Rupp Company*, 136 F.3d 695 (10th Cir. 1998) as an example of a case where a privilege was not waived because the information placed at issue was determined not to be vital to the opposing party's defense of the case. *Frontier Refining* is distinguishable from the matter at hand. In *Frontier Refining*, a party sought access to files of counsel for Frontier Refining in an earlier litigation. The Tenth Circuit found that witnesses other than Frontier Refining's former attorneys possessed the same information that Gorman-Rupp sought from the attorneys, such as opposing attorneys in the prior litigation, employees or representatives of Frontier Refining, and expert witnesses. Thus, the information for which the attorney-client privilege was claimed "was not truly 'vital' to Gorman-Rupp's defense." *Frontier Refining*, 136 F.3d at 702. The present case involves a request for the results of environmental samples as opposed to litigation files from some prior lawsuit. Unlike the situation in *Frontier Refining* which involved documents that had been duplicated and were available from non-privileged sources, the information sought from Cobb-Vantress is a unique set of sampling data and Plaintiff and its experts are the **sole custodians** of that information. There are no other persons from whom Cobb-Vantress can obtain information about the environmental conditions that existed in the locations tested by Plaintiffs on the dates when such sampling was conducted.

Plaintiff also argues, without citation to any supporting legal authority, that Cobb-Vantress is not entitled to the facts and information because it "could conduct its own

investigation and environmental sampling." (Pls. Response, p. 22; Dkt. No. 799.) Plaintiff states that Cobb-Vantress "can do the same investigation now." *Id.* However, that simply is not true. Cobb-Vantress cannot go back in time to unknown locations and collect identical samples of its own. Sampling data are context-specific, not facts in abstract. Sampled media – and thus, sampling results – are dependent upon a unique set of circumstances which cannot later be reproduced or replicated by other parties because they reflect time-specific conditions such as: weather, surface water flow rates and the impacts of sources whose effects may be intermittent as opposed to continuous (i.e., sources that affect the media sampled at that present moment in time). It is, therefore, *impossible* for Cobb-Vantress to replicate Plaintiff's earlier sampling.

Furthermore, Cobb-Vantress can not be expected to conduct "defensive" sampling in the IRW without some indication of the nature of the evidence that it needs to refute. The claims made by Plaintiffs in their complaint are broad, alleging injury to soils, surface water, groundwater, biota and sediments throughout the entire IRW. (First Am. Compl., ¶ 1.) The IRW is an expansive geographic area consisting of 1,069,530 acres of land owned by thousands of different individuals and entities. (*See id.*, ¶ 22.) Through and beneath this expanse of land run several different groundwater aquifers, hundreds of small creeks and streams and three lengthy major tributaries. The streams, creeks and tributaries wind their way throughout the rugged eastern Oklahoma terrain for a combined reach of well over 200 stream miles. Plaintiff claims that the IRW has been impacted by elevated levels of a host of different substances including: phosphorus, nitrogen, arsenic, zinc, cooper, pathogens and hormones. (First Am. Compl., ¶¶ 58-59.) Cobb-Vantress cannot conduct the same investigation as Plaintiff without knowing where within the IRW Plaintiff has taken samples, what type of media Plaintiff has sampled, what tests Plaintiff has conducted on the samples and the results of those tests. This is

precisely the information sought by Cobb-Vantress in the First Set of Discovery. Cobb-Vantress cannot determine the nature, extent and location of sampling and investigation needed to defend against Plaintiff's claims until Plaintiff is ordered to provide the information sought in the First Set of Discovery.

The test for "at issue" waiver is easily met in the present case. The information sought by Cobb-Vantress is undeniably relevant. Plaintiff has put that information at issue through numerous statements made in pleadings and at hearings in which Plaintiff sought and obtained relief based upon its representations as to the results of its environmental sampling and investigation. Sustaining Plaintiff's claim of privilege in these circumstances would clearly deprive Cobb-Vantress of information vital to its ability to defend against Plaintiff's claims. An "at-issue" waiver has occurred. Consequently, Plaintiff must be ordered to provide the information and documents sought in the First Set of Discovery. Any other ruling by this Court would be reversible error.

C. Federal Rule 26(b)(3) Does Not Prevent the Discovery Sought.

Even if this Court were to conclude that a waiver has not occurred, Cobb-Vantress' motion should nonetheless be granted because the First Set of Discovery seeks *factual information* for which Cobb-Vantress has a *substantial need* in preparing its defense in this case.

1) Factual Information is Not Protected by the Work-Product Doctrine.

"[C]ourts have consistently held that the work product concept furnishes no shield against discovery . . . of ***the facts*** that the adverse party's lawyer has learned, or the person from whom

he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery." *Protective Nat. Ins. Co. of Omaha v. Commonwealth Ins. Co.*, 137 F.R.D. 267, 280 (D. Neb. 1989) (citing 8 C. Wright & A. Miller, *Federal Practice & Procedure* § 2023, at 194 (1970)). Plaintiff does not appear to challenge this well-recognized proposition of law. Instead, it seeks to avoid the application of this legal principle to the First Set of Discovery by the mere assertion (unsupported by any evidence) that "the Information is not, as Defendant contends, simple facts." (Pls. Response, p. 4, Dkt. 799.)

Of course, neither Cobb-Vantress nor this Court can evaluate the true character of documents and information which have been withheld from it. All Cobb-Vantress and the Court presently have before it is the First Set of Discovery which details what Cobb-Vantress **seeks** as opposed to what Plaintiff claims to have. The First Set of Discovery seeks information like dates of sampling, locations of sampling, the results of sampling, descriptions of what was sampled and descriptions of tests performed on samples. (*See* Ex. 1 to Mot. to Compel, First Set of Discovery; Dkt. No. 743.) These are facts. Other environmental cases have held that precisely this sort of information constitutes facts. As Cobb-Vantress pointed out in its Motion, the *Horan* court concluded that information such as the results of any assessments or environmental testing, the engineering specifications for any such test, the identity of the person conducting such testing, the precise location on the premises of the test, the qualifications and training of any person conducting the testing, the quality assurance techniques used to validate testing methods, and the precise location on the premises of any oil, gasoline, petroleum-based substances, or chemical substances discovered as a result of testing constitutes **factual information** not covered by a claim of attorney work-product. *See Horan v. Sun*, 152 F.R.D.

437, 437-438 (D. R.I. 1993)).[2] Similarly, in another environmental case the court in *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 634 (M.D. Pa. 1997), held that "tables compiled from testing done to determine the contaminants present at the site, proposed methods of remediation, or summaries of meetings, communications, or telephone conversations between state or federal regulatory authorities and expert consultants, or between the alleged violator and the authorities, are not protected from disclosure as work product." *Id.* at 634. Plaintiff has not identified a single environmental case whether before or after the 1993 Amendments to Rule 26(a) where a court held that the locations, dates and results of environmental sampling was privileged information exempt from discovery.

Even if the facts that Cobb-Vantress seeks happen to be interspersed through materials that also contain "opinions" or "analysis" of Plaintiff's counsel or its experts, that does not render **the facts** immune from disclosure in discovery. If the Court finds this situation is present after its *in camera* review of the materials, then the Court is charged under Rule 26(b)(3) with developing a procedure under which the factual information sought can be disclosed without "disclosure of the mental impressions, conclusion, opinions or legal theories of an attorney or other representative of a party concerning the litigation." FED. R. CIV. P. 26(b)(3). Redaction of

[2] In its Response, Plaintiff criticizes Cobb-Vantress' citation to *Horan* and *Atlantic Richfield v. Current Controls, Inc.*, 1997 WL 538876 (W.D.N.Y. 1997). (Pls. Response, pp. 19-20; Dkt. No. 799). Plaintiff's criticism is based on the fact that both *Horan* and *Atlantic Richfield* were decided by district courts that chose to opt-out of the 1993 amendments to Rule 26(a). This is simply a red herring. *Horan* and *Atlantic Richfield* were cited by Cobb-Vantress for a very limited purpose: *Horan* for the idea that "environmental test results contain relevant, non-privileged facts," 152 F.R.D. at 439, and *Atlantic Richfield* for the view that facts gathered by experts are not privileged attorney work product. Neither of these findings is affected by the 1993 amendments to Rule 26(a). The 1993 amendments created a duty for parties "to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement." Advisory Committee Note, 1993 Amendments. Plaintiff's suggestion that these two courts would have reversed course and permitted the withholding of facts had they only consulted new procedural rules requiring early and voluntarily disclosure of facts is absurd.

materials is one option available to Plaintiff and to this Court. In addition, the Court can and should order Plaintiff to provide the factual information requested in Cobb-Vantress' interrogatories. The use of interrogatories to obtain ***factual*** information in environmental cases even though those facts may have been gathered by attorneys or described in documents prepared in anticipation of litigation is well recognized in the case law. *See, e.g., Atlantic Richfield Co. v. Current Controls, Inc.*, 1997 WL 538876 at *3 (W.D.N.Y. Aug. 21, 1997) (facts gathered by experts are not privileged attorney work product and can be discovered "by, for example, serving interrogatories on ARCO and/or by deposing the consultants.")

Plaintiff's final desperate attempt to transform clearly factual and, therefore, non-privileged information into something that would qualify as attorney work-product is found in its claim that the information "contains the imprint of its attorneys' mental impressions and theory of the case" because "counsel for the State chose the experts to do the information gathering (sampling, testing, analysis, etc.) and worked with these experts to develop a plan to gather and evaluate the Information." (Pls. Resp., pp. 8, 11; Dkt. No. 799.) In support of this novel and sweeping extension of attorney work-product protection to factual information, Plaintiff cites several cases which are in no way analogous to the situation before this Court. *Sporck v. Peil*, 759 F.2d 312 (3rd Cir. 1985) found that the process of defense counsel selecting certain documents out of a larger set and grouping those documents together is in itself opinion work product entitled to a protection from disclosure. *Shoemaker v. General Motors Corp.*, 154 F.R.D. 235 (W.D. Mo. 1994), cited by Plaintiff for the proposition that an attorney's "decision as to what to test and how is the embodiment of the attorney's legal theories," Pl's. Resp., at 6, is also distinguishable from the situation at hand. Although *Shoemaker* involved testing for the purposes of litigation, the testing had not yet occurred and, therefore, the party conducting the

tests had not relied upon the results in motions to the court, as Plaintiff has done here. Moreover, the court's decision in *Shoemaker* focused solely on the issue of whether the moving party's attorney could personally attend the testing and thereby look over the shoulders of opposing counsel and their experts as they decided what to test (and what not to test) and how to test it. In its First Motion to Compel, Cobb-Vantress has not requested that it be permitted to attend the (now completed) testing conducted by Plaintiff or to be a part of ongoing discussions between Plaintiff and its experts about what to test and what not to test. Rather, Cobb-Vantress seeks to discover the location, nature, and results of tests conducted privately by Plaintiff, outside the presence of Cobb-Vantress. The *Shoemaker* court did not reach the question of disclosure of test results, and thus, *Shoemaker* is simply not applicable to the situation at hand.

2) Even if Covered by the Work-Product Privilege, Cobb-Vantress Has Met the Substantial Need Exception Under Rule 26(b)(3).

Even if the Court were to conclude that the information sought in the First Set of Discovery constituted attorney work-product, Cobb-Vantress is entitled to that information because it has a substantial need for the information in the preparation of its defense and is unable to obtain the substantial equivalent of the information without undue hardship. FED. R. CIV. P. 26(b)(3). The protection provided by Rule 26(b)(3) to ordinary work product is conditional and "may be set aside if the discovering party demonstrates a sufficiently pressing need for the data." *In re Kidder Peabody Secs. Litig.*, 168 F.R.D. 459, 462 (S.D.N.Y. 1996) (citation omitted)). Cobb-Vantress has very clearly met the requirement for discovery of information protected by Rule 26(b)(3) by showing that it has a substantial need for the information and documents requested and that it would encounter undue hardship in obtaining substantially equivalent information from a source other than Plaintiff. The information and documents sought in the First Set of Discovery are associated with environmental testing

performed in the past. Cobb-Vantress has no knowledge as to where the sampling occurred, what media was sampled, what tests were performed on the samples, or on what dates the sampling occurred.

As stated above, Cobb-Vantress cannot conduct "the same investigation" as the Plaintiff because the sampling events and conditions under which the data withheld was collected have passed. Furthermore, Cobb-Vantress cannot be expected to conduct "defensive" sampling throughout the expansive IRW without some indication of the nature of the evidence that it needs to refute. Cobb-Vantress cannot determine the nature, extent and locations of any testing it needs to conduct to defend itself without knowing where within the IRW Plaintiff has taken samples, what type of media Plaintiff has sampled, what tests Plaintiff has conducted on the samples and the results of those tests. This is precisely the information sought by Cobb-Vantress in the First Set of Discovery. Without the information requested in the First Set of Discovery, Cobb-Vantress would need to conduct sampling events on each of the thousands of legally distinct, individually owned parcels of land in the IRW and every cubic foot of water and sediments found in each of the creeks, streams, and tributaries flowing through the IRW in order to ensure that it has data of its own to refute whatever sampling has been conducted by Plaintiff. It is plain to see that such an undertaking would be impracticable and would impose an undue burden on Cobb-Vantress.

Plaintiff cites three cases which it contends support its argument that Cobb-Vantress has not satisfied the substantial need and undue hardship required for discovery under Rule 26(b)(3). Each of these three cases is distinguishable from the present situation. Here again, none of the cases relied upon by Plaintiff are environmental cases and none of them involved questions bearing upon the discoverability of sampling data. In *Goodyear Tire and Rubber Company v.*

Chiles Power Supply, Inc., 190 F.R.D. 532 (S.D. Ind. 1999), the court found that discovery under Rule 26(b)(3) was not warranted because Goodyear delayed for two or three years in seeking to obtain ***witness statements*** taken by its customer's non-party insurer. The court also noted that "Goodyear has not offered any evidence to show that it was prevented from ascertaining the names and addresses of the [persons whose statements it was seeking]." 190 F.R.D. at 539. Similarly, in *Almaguer v. Chicago, Rock Island & Pacific Railroad Company*, 55 F.R.D. 147 (D. Neb. 1972), the court denied the production of a ***witness's statement*** taken by defendant's non-lawyer claim agent. Plaintiff did not claim that the identity of the witness was unknown. The court stated that "no explanation has been offered for the failure, if there be a failure, of the plaintiff's counsel to obtain a statement from Schipper." 55 F.R.D. at 149-150.

In both *Goodyear* and *Almaguer*, the source of the information sought was known to the seeking party. This is unlike the present situation where Cobb-Vantress is unable, without disclosure by Plaintiff, to obtain specific information which would allow it to duplicate the testing conducted by Plaintiff.

Finally, in *Martin v. Monfort, Inc.*, 150 F.R.D. 172 (D. Colo. 1993), the Department of Labor moved to compel production of time and motion studies performed by Monfort at the direction of Monfort's general counsel. The court denied the motion to compel, noting:

> No showing has been made as to why the DOL could not have performed similar studies in 1990; why the same or substantially similar studies cannot be performed today; why the studies would have any substantial bearing on the issue of willfulness; or how the studies could impact the amount of the potential recovery.

Martin, 150 F.R.D. at 173-174. Here, Cobb-Vantress has most definitely demonstrated that it cannot now perform the same studies performed by Plaintiff in the past. Cobb-Vantress did not perform similar studies at the same time that Plaintiff conducted its studies because it was not

informed that Plaintiff was even conducting any such sampling, much less provided with any specific information regarding the sampling.

D. Rule 26(b)(4)(B) – Exceptional Circumstances

As a hedge on its position that the information sought is attorney-work product which it should never be required to disclose, Plaintiff argues alternatively that the information need not be disclosed until this Court establishes a deadline for expert reports pursuant to Rule 26(a)(2)(C). Until such time, Plaintiff claims that the facts and information sought in Cobb-Vantress' information is privileged because those facts and information were gathered by consultants whom Plaintiff has not yet been forced to designate as testifying experts.

There are, of course, several problems with the position taken by Plaintiff. The first, and perhaps most substantial, problem is a practical one. The timing of discovery is critical to the orderly development of any case, but especially complex cases such as this. Plaintiff hopes to secure the right to spring its sampling results upon Cobb-Vantress and the other defendants shortly before trial when expert reports are submitted. Any ruling by this Court granting such a right to Plaintiff would be highly prejudicial to Cobb-Vantress' ability to adequately prepare a defense in this case and would severely delay the progression of this case. Plaintiff will undoubtedly seek to establish liability on the part of the defendants through sampling conducted at a small subset of locations with not every location being tested for every constituent identified in Plaintiff's complaint. If this Court determines that Cobb-Vantress will learn the nature, locations and results of Plaintiff's environmental sampling for the very first time shortly before trial when expert reports are submitted, then it should be prepared to address the inevitable motion by Cobb-Vantress and the other defendants for a continuance of the trial of this matter until such time as the defendants have been able to conduct any environmental sampling or

investigation necessary to specifically respond to the evidence which Plaintiff intends to use to establish liability on the part of the defendants. As this Court well knows, environmental sampling requires a considerable amount of time to plan and conduct and its timing is often dependent upon seasonal changes and weather conditions which rarely coincide with the scheduling preferences of the parties, lawyers, experts or the Court. Consequently, this Court should expect that the inevitable delay presented by Plaintiff's suggested approach to the disclosure of its environmental sampling would be significant.[3]

The second problem with Plaintiff's discoverability analysis under Fed. R. Civ. P. 26(b)(4)(B) is that this provision, even if found applicable to the information sought, is not an absolute bar on discovery. Cobb-Vantress may still obtain discovery of facts known and opinions held by Plaintiff's experts now because it has shown the existence of "exceptional circumstances under which it is impracticable for [Cobb-Vantress] to obtain facts or opinions on the same subject by other means." Fed.R.Civ.P. 26(b)(4)(B).

As Plaintiff points out in its Response, exceptional circumstances exist where "the object or condition at issue is destroyed or has deteriorated after the non-testifying expert observes it but before the moving party's expert has an opportunity to observe it." Pl's. Resp., p 17 (citing

---

[3] In the event that the Court determines that Plaintiff is entitled to withhold factual information gathered by experts until expert reports are submitted, Cobb-Vantress asks the Court to exercise its discretion under FED. R. CIV. P. 26(a)(2)(C) to structure the timing and sequence of expert disclosures in a manner that lessens the prejudice to defendants caused by such a ruling. More specifically, the Court could order an early disclosure date of sampling data and other factual or technical information followed by a subsequent disclosure of the opinions of Plaintiffs' experts. In addition, the deadline for expert disclosures by defendants should be at least one year after the disclosure of this data so that defendants will have sufficient time to conduct necessary sampling at appropriate locations during appropriate seasons or weather conditions. Rule 26 clearly contemplates a staggered disclosure of expert opinions and reports in complex cases. Advisory Note, 1993 Amendments, Subdivision (a), Paragraph (2). "In most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue."

Spearman Indus., Inc. v. St. Paul Fire & Marine Ins. Co., 128 F.Supp.2d 1148, 1152 (N.D. Ill. 2001)); *see also, Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 1993 WL 257229 (S.D.N.Y.) (exceptional circumstances test met where purportedly protected information was "unique factual information no longer available" to the party seeking discovery); *Braun v. Lorillard, Inc.*, 84 F.3d 230, 236 (7th Cir. 1996) (Rule 26(b)(4)(B) exception met with respect to biological samples destroyed during testing because the "only way the defense could find out whether there were crocidolite asbestos fibers in the tissues that plaintiff's experts had tested was to get the [plaintiff's] test results.")

Discovery from a non-testifying expert was permitted on similar grounds under the exceptional circumstances test in the case of *Delcastor, Inc. v. Vail Assoc., Inc.*, 108 F.R.D. 405 (D. Colo. 1985). In *Delcastor*, the district court found that plaintiff was entitled to discovery information from a defendant's non-testifying expert witness because he was the only person to observe site conditions immediately after a mudslide. *Id.* at 409. Although other experts had visited the site, plaintiff was still entitled to discover information from defendant's expert because by the time subsequent investigations were conducted, site condition had "changed considerably, due not only to the unseasonably warm temperatures . . . but also due to human activities." *Id.* The court further noted that the relevant "site conditions, of course, cannot now be reconstructed." *Id.* at 408-09. In permitting discovery from the non-testifying expert, the court stated that "a number of cases hold that 'exceptional circumstances' allowing for discovery of non-testifying expert's opinion exists where the object or condition is not observable by an expert of the party seeking discovery." *Id.*

The information sought by Cobb-Vantress clearly satisfies the "exception circumstances" test as articulated by the courts in *Spearman*, *Morse/Diesel*, *Braun* and *Delcastor*. Cobb-

Vantress does not have access to the samples collected and hence can perform no tests of its own to characterize the conditions present in the media from which these samples were taken. Furthermore, even if the locations of where the samples were collected were made known to Cobb-Vantress, the conditions that existed on the dates on which Plaintiff sampled have undoubtedly changed and cannot be reconstructed by Cobb-Vantress. Thus, the *only* means by which Cobb-Vantress can ascertain facts relative to the environmental conditions which Plaintiff sought to characterize through its historical sampling efforts is to obtain discovery from the Plaintiff of the nature, location, extent and results of its sampling.

Plaintiff asserts that this Court should deny Cobb-Vantress' motion to compel because Cobb-Vantress "has made no timely effort to get the information itself." (Pl's. Resp., p. 17; Dkt. No. 799) (citing *Hoffman v. Owens-Illinois Glass Co.*, 107 F.R.D. 793, 795 (D. Mass. 1985); *Spearman*, 128 F.Supp.2d at 1152).) As is the case with all of the authority cited by Plaintiff in its Response, both *Hoffman* and *Spearman* are distinguishable from the present dispute, as neither involved the type of sampling at issue here. *Hoffman* focused on a motion to compel an expert report and two letters prepared by plaintiff's representative and involved a machine upon which an employee was injured. The machine was moved from the facility where the injury occurred and later sold. Exceptional circumstances did not exist because the defendant made no effort to inspect the machine, despite various actions taken by other parties which should have prompted the defendant to seek an inspection. The court stated "[a]ny impracticability which the defendant Textron now faces is a result of its own counsel's tardiness in seeking to inspect the machine." *Hoffman*, 107 F.R.D. at 795. In *Spearman* the court found that the defendant did not meet its burden in demonstrating exceptional circumstances, stating as follows:

> [D]efendant has substantial information relating to the condition of the roof and the cause of damage. Defendant had ample opportunity to conduct whatever

> investigations it desired and the site was inspected by [persons] hired by defendant. Thus, Kurucz is not the sole source of facts and opinions regarding the cause of damage to the roof.

Spearman, 128 F.Supp.2d at 1152.

In both *Hoffman* and *Spearman*, the existence and location of the object which had been tested or observed by one party was known to the party seeking discovery. As has been discussed, this case involves thousands of potentially relevant properties or sampling locations as opposed to a single machine on which an employee of injured. Furthermore, Cobb-Vantress has not delayed in its efforts to obtain the requested information. Cobb-Vantress promptly sought to identify the dates and locations of Plaintiff's sampling and the results after Plaintiff disclosed its activities in its Motion for Expedited Discovery. Plaintiff's samples were taken in the past, and the environmental conditions characterized through such sampling have undoubtedly changed and cannot be replicated. Because those samples were collected outside of Cobb-Vantress' knowledge, Cobb-Vantress had no opportunity to collect substantially identical samples from the locations at issue on the dates in question. Consequently, Cobb-Vantress cannot now obtain these substantial equivalents of this sampling data from means other than its First Set of Discovery to Plaintiff.

III. CONCLUSION

For the foregoing reasons, Defendant Cobb-Vantress, Inc. respectfully requests that its First Motion to Compel Discovery be granted and for all other relief to which it is properly entitled.

Respectfully submitted,

KUTAK ROCK LLP

By: /s/ Robert W. George

Robert W. George, OBA #18562
The Three Sisters Building
214 West Dickson Street
Fayetteville, AR 72701-5221
(479) 973-4200 Telephone
(479) 973-0007 Facsimile

Attorneys for Defendant,
Cobb-Vantress, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants.

Jo Nan Allen	Frederick C. Baker	Tim K. Baker
Douglas L. Boyd	Vicki Bronson	Paula M. Buchwald
Louis W. Bullock	Lloyd E. Cole, Jr.	Angela D. Cotner
John Breian DesBarres	W. A. Drew Edmondson	Delmare R. Ehrich
John Elrod	William B. Federman	Bruce W. Freeman
Ronnie Jack Freeman	Richard T. Garren	D. Sharon Gentry
Tony M. Graham	James M. Graves	Michael D. Graves
Thomas J. Grever	Jennifer S. Griffin	Carrie Griffith
John T. Hammons	Jean Burnett	Michael T. Hembree
Theresa Noble Hill	Philip D. Hixon	Mark D. Hopson
Kelly S. Hunter Burch	Stephen L. Jantzen	Mackenzie Hamilton Jessie
Bruce Jones	Jay T. Jorgensen	Krisann C. Kleibacker Lee
Raymond T. Lay	Nicole M. Longwell	Dara D. Mann
Linda C. Martin	A. Scott McDaniel	Robert Park Medearis, Jr.
James Randall Miller	Robert A. Nance	John Stephen Neas
George W. Owens	David Phillip Page	K. Clark Phipps
Marcus N. Ratcliff	Robert P. Redemann	M. David Riggs
Randall E. Rose	Patrick Michael Ryan	Robert E. Sanders
David Charles Senger	William F. Smith	Jennifer F. Sherrill
Colin H. Tucker	John H. Tucker	R. Pope Van Cleef, Jr.
Kenneth E. Wagner	David A. Walls	Elizabeth C. Ward
Sharon K. Weaver	Timothy K. Webster	Gary V. Weeks
Adam Scott Weintraub	Terry W. West	Dale Kenyon Williams, Jr.
E. Stephen Williams	Douglas Allen Wilson	J. Ron Wright
Lawrence W. Zeringue	Bobby Jay Coffman	Laura Samuelson
Reuben Davis	Thomas Janer	Jerry M. Maddux
Steven E. Holden	Michael L. Carr	Michelle B. Skeens
Robert Applegate		

and I further certify that a true and correct copy of the above and foregoing will be mailed via first class U.S. Mail, postage properly paid, on the following who are not registered participants of the ECF System:

C. Miles Tolbert Secretary of the Environment State of Oklahoma 3800 N. Classen Oklahoma City, OK 73118 **PLAINTIFF**	William H. Narwold MOTLEY RICE LLC 20 Church Street 17th Floor Hartford, CT 06103 **ATTORNEYS FOR PLAINTIFF**
Monte W. Strout 209 W. Keetoowah Tahlequah, OK 74464 **ATTORNEY FOR CLAIRE WELLS, LOUISE SQUYRES, THIRD-PARTY DEFENDANTS**	Robin Wofford Rt. 2, Box 370 Watts, OK 74964 **PRO SE, THIRD PARTY DEFENDANT**
James R. Lamb D. Jean Lamb STRAYHORN LANDING Rt. 1, Box 253 Gore, OK 74435 **PRO SE, THIRD PARTY DEFENDANTS**	Gordon and Susann Clinton 23605 S. Goodnight Lane Welling, OK 74471 **THIRD PARTY DEFENDANT**
Kenneth and Jane Spencer James C. Geiger Individually and dba Spencer Ridge Resort Route 1, Box 222 Kansas, OK 74347 **PRO SE, THIRD PARTY DEFENDANTS**	Ancil Maggard c/o Leila Kelly 2615 Stagecoach Dr. Fayetteville, AR 72703 **THIRD PARTY DEFENDANT**
C. Craig Heffington 20144 W. Sixshooter Rd. Cookson, OK 74427 **PRO SE, SIX SHOOTER RESORT AND MARINA, INC., THIRD-PARTY DEFENDANT**	Richard E. Parker Donna S. Parker BURNT CABIN MARINA & RESORT, LLC 34996 S. 502**Error! Bookmark not defined.** Road Park Hill, OK 74451 **PRO SE, THIRD PARTY DEFENDANT**

James D. Morrison Rural Route #1, Box 278 Colcord, OK 74338 **PRO SE, THIRD PARTY DEFENDANT**	Jim R. Bagby Route 2, Box 1711 Westville, OK 74965 **PRO SE, THIRD PARTY DEFENDANT**
Marjorie A. Garman 5116 Hwy. 10 Tahlequah, OK 74464 **THIRD PARTY DEFENDANT**	Doris Mares Dba Cookson Country Store and Cabins P.O. Box 46 Cookson, OK 74424 **PRO SE, THIRD PARTY DEFENDANT**
Eugene Dill P.O. Box 46 Cookson, OK 74424 **PRO SE, THIRD PARTY DEFENDANT**	Linda C. Martin N. Lance Bryan Doerner, Saunders 320 S. Boston Ave., Ste. 500 Tulsa, OK 74103 **THIRD PARTY DEFENDANT**
John and Virginia Adair Adair Family Trust Route 2, Box 1160 Stilwell, OK 74960 **THIRD PARTY DEFENDANT**	Charles L. Moulton Arkansas Natural Resources Commission 323 Center St., Ste. 200 Little Rock, AR 72206
Cherrie and William House P.O. Box 1097 Stilwell, OK 74960 **THIRD PARTY DEFENDANT**	Jerry M. Maddux Selby Connor Maddux Janer P.O. Box Z Bartlesvill, OK 74005-5025 **ATTORNEYS FOR SUZANNE ZEIDERS**

/s/ Robert W. George
Robert W. George